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In the Supreme Court of the United States

OCTOBER TERM, 1964.

No. 1017.

THE INTERLAKE STEAMSHIP COMPANY,

Petitioner,

v.

MARCELLA R. NIELSEN, and STEPHEN O'HEARNE, as Successor to JOHN J. NEWMAN, Deputy Commissioner, Administering the Longshoremen's and Harbor Workers' Compensation Act,

Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals For the Sixth Circuit.

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No. _____.

THE INTERLAKE STEAMSHIP COMPANY,

Petitioner,

v.

MARCELLA R. NIELSEN, and STEPHEN O'HEARNE, as Successor to JOHN J. NEWMAN, Deputy Commissioner, Administering the Longshoremen's and Harbor Workers' Compensation Act,

Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals For the Sixth Circuit.

Petitioner, The Interlake Steamship Company, prays that the Court issue its writ of certiorari to the United States Court of Appeals for the Sixth Circuit to review the judgments in causes No. 15,705 and No. 15,706 on the docket of that court.

OPINIONS BELOW.

The opinions below that generate the question that now comes to the Court under the Longshoremen's and Harbor Workers' Compensation Act may be found as follows:

Opinion of the Deputy Commissioner, making an award under the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. 901, et

seq., is unreported but appears in the Appendix hereto, printed under separate cover, at page 2.

Opinion of United States District Judge Jones of the Northern District of Ohio, upon review of the award pursuant to 33 U. S. C. 921(b), setting the award aside on the ground the accident was not one "occurring upon the navigable waters of the United States" within the meaning of the statute, 33 U. S. C. 903(a), is likewise unreported but appears in the Appendix at page 8.

Supplemental opinion of District Judge Jones, unreported, is in the Appendix at page 16.

Opinion of the United States Court of Appeals for the Sixth Circuit, written by Judge Edwards (with the concurrence of Judge Weick, Chief Judge of the Sixth Circuit, and Judge Prettyman, Senior Circuit Judge of the District of Columbia Circuit, sitting by designation) reinstating the award, is reported in 338 F. 2d 879, and appears in the Appendix at page 17.

JURISDICTION.

The judgments in question are dated and were entered December 3, 1964 (Appendix, p. 24); timely petition for rehearing was denied January 12, 1965. (Appendix, p. 25.)

This Court has jurisdiction to review under 28 U. S. C. 1254(1), within the 90 days fixed by 28 U. S. C. 2101(c).

QUESTION PRESENTED.

This case, arising under the Longshoremen's and Harbor Workers' Compensation Act, presents the question:

> Whether the provision of the Longshoremen's and Harbor Workers' Compensation Act, authorizing the grant of compensation "only if the disability or death results from an injury occurring upon the navigable waters of the United States," 33 U. S. C. 903(a), is satisfied where a shipkeeper met death when he "drove his car off the end of the dock" into the navigable waters of Lake Erie.

If driving "his car off the end of the dock" is an act "occurring upon the navigable waters," within the meaning of the statute, the award of compensation is correct; if not, recovery may be had only under the Ohio Workmen's Compensation Act. Ohio Revised Code § 4123.01. The Ohio statute clearly would cover the death here in question. *Klump v. Industrial Commission of Ohio* (1940), 65 Ohio App. 270, 29 N. E. 2d 627 (Judges Ross, Hamilton and Matthews).

The award made, and set aside by the District Court, was at the rate of $52.65 per week from January 12, 1959 (amounting to $10,845.90, plus $400 for funeral expenses), and $52.65 per week commencing December 24, 1962. (Appendix, pp. 6-7.)

Under the Ohio Act, since the decedent's weekly wage was "in excess of $81.00 per week" (Appendix, p. 5) the benefits would be $49 per week (from January 12, 1959) continuing until $15,000 shall have been paid, plus, in this case, an additional $1,000 for each of the three dependents, amounting to a total of $18,000. Ohio Revised Code § 4123.59(B).

STATUTE INVOLVED.

This case turns on § 3 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. 903, Act of March 4, 1927, c. 509, § 3, 44 Stat. 1426. The statute, with the portion here pertinent italicized, reads:

"**§ 903. COVERAGE.**

(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but *only if the disability or death results from an injury occurring upon the navigable waters of the United States* (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect of the disability or death of—

(1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

(2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.

(b) No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another."

STATEMENT OF CASE.

The action arises under the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. 901, *et seq.*, and concerns only the question whether the accident occurred "upon the navigable waters of the United States." 33 U. S. C. 903(a).

The record presents two cases, and two judgments, because a beneficiary and the Deputy Commissioner administering the Longshoremen's Act separately appealed the District Court's judgment setting aside the award. The two appeals were consolidated for hearing by the Court of Appeals and jointly present the single question brought here.

—The Facts on Which Case Turns.

The Deputy Commissioner found, both courts below agreed, and it is undisputed here, that Carl O. Nielsen, the decedent, as the Court of Appeals summarized it (Appendix, p. 18):

"drove his car off the end of the dock * * *."

Why he did this the record does not show.

The decedent was employed as the shipkeeper on the Great Lakes freighter ARCTURUS, moored for the winter in Maumee Bay at Toledo, Ohio. He was last seen alive at his home on a Saturday night in January 1959. The Deputy Commissioner found that "on the aforesaid Saturday night of January 10, 1959, between 9:00 and 10:00, the deceased, after having had his supper at home, left home by his automobile * * *." (Appendix, p. 4.) His body was recovered two days later in deep water "at the outer end of the dock" (Appendix, p. 4) at a point "approximately 25 feet" from its edge. (Appendix, p. 5.)

When the body was recovered from the waters of the bay:

> "the deceased was seated in the driver's seat of his automobile with his hands on the wheel and his foot on the brake * * *." (Appendix, p. 4.)

The watch the decedent carried had stopped at 3:15. (Appendix, p. 5.) The Deputy Commissioner concluded, therefore, that the accident and death occurred at 3:15 A. M. Sunday, January 11, 1959 (Appendix, p. 5) and that:

> "the aforesaid Carl O. Nielsen suffered injury when, striking the aforesaid mooring lines enroute, he drove his car over and off the outer end of the dock and into the ice and water of the aforesaid Maumee Bay; that as a result of said injury the aforesaid Carl O. Nielsen sustained skull fractures and brain damage which caused his death * * *." (Appendix, p. 5.)

The decedent, shortly before his death (Appendix, p. 5) "had imbibed some six to eight ounces of whiskey," but, the Deputy Commissioner added:

> "the fatal injury was not occasioned solely by the intoxication of the employee * * *." (Appendix, p. 5.)

—Longshoremen's Act Alone Controls.

The only federal act applicable is the Longshoremen's and Harbor Workers' Compensation Act. 33 U. S. C. 901, *et seq.* The statute's exclusion of liability, 33 U. S. C. 903(a)(1), to a "member of a crew" does not here apply because the vessel was withdrawn from navigation (and had been for more than a year). Decedent, who served as custodian, or "shipkeeper," therefore could not be regarded as "crew." *Hawn v. American S. S. Co.* (2 C. A., 1939), 107 F. 2d 999; *O'Leary v. Coastal Nav. Co.* (9 C. A., 1951), 193 F. 2d 717. And, because the decedent was not a "sea-

man," the Jones Act, 46 U. S. C. 688, 41 Stat. 1007, does not apply.

Of the Longshoremen's Act, the only portion here applicable—the meaning of which is in question—is the statute's provision that compensation thereunder shall be payable:

> "only if the disability or death results from an injury occurring upon the navigable waters of the United States * * *." 33 U. S. C. 903(a).

—Basis of Division in Courts Below.

Concerning the legal effect of the facts found—as above set forth—the courts below divided.

The District Court held the accident did not occur "upon the navigable waters of the United States" as specified by the statute. 33 U. S. C. 903(a). The District Court considered:

> "The place of culmination of an injury, whether it be by drowning or by striking the dock, is not determinative of whether admiralty has jurisdiction" (Appendix, p. 14),

and held:

> "the test must be that *if the impetus which put in motion the sequence of events* resulting in the fatal accident came from the land, and operated on the person injured while on land, then there can be no jurisdiction and no valid award." (Appendix, p. 14.)[1]

The Court of Appeals, on the other hand, held the accident *did* occur "upon the navigable waters" *because nothing happened to the decedent until he hit the icy waters of Maumee Bay*—which admittedly are "navigable waters." (Appendix, p. 18.) It was the consummation on

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[1] Emphasis supplied throughout.

the water of events originating on the dock that, the Court of Appeals thought, controlled. The Court of Appeals reasoned:

> "No one asserts that claimant was killed (or injured) *until the impact* on the frozen substance of the navigable waters at the end of the dock." (Appendix, p. 23.)

This is the reasoning that satisfied the man who fell from the 50th floor of a skyscraper, as he passed the 6th, that he was quite all right, for nothing had happened.

It is this reasoning that led the Court of Appeals to the conclusion that "the situs of his injury and death was clearly within the scope of admiralty jurisdiction." (Appendix, p. 23.)

As will be seen, this Court has five times repudiated this as a test of admiralty jurisdiction, and has three times rejected the rule the Court of Appeals has now made law in the Sixth Circuit.

REASONS FOR GRANT OF WRIT.

This case presents the kind of problem this Court should review, because:

I. RULING BELOW BRINGS UNCERTAINTY TO THE ONE AREA OF ADMIRALTY LAW THAT, SINCE ENACTMENT OF LONGSHOREMEN'S ACT NEARLY FOUR DECADES AGO, HAS HAD CLEAR AND CERTAIN MEANING.

Until now the meaning of the provision that the Longshoremen's and Harbor Workers' Compensation Act applies, 33 U. S. C. 903(a):

> "only if the disability or death results from an injury occurring upon the navigable waters of the United States"

has been clear. Judge Chesnut, in *Ford v. Parker* (D. C. Md., 1943), 52 F. Supp. 98, 101, called the governing rule "simple and easily applied"—itself a very great merit.

But, under the decision below, this is no longer so.

1. Controversy Has Raged Over Other Provisions of Statute—But Not This.

Controversy, with roots in *Southern Pacific Company v. Jensen* (1917), 244 U. S. 205, as this Court knows better than most, has plagued the Longshoremen's Act. The storm has centered on the meaning of the provision that the Longshoremen's Act shall apply only "if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law." This issue is no more—for

—(a) Calbeck Settled "State Law" Issue; It Brought Certainty to that Part of Act.

By *Calbeck v. Travelers Insurance Co.* (1962), 370 U. S. 114, this Court settled the controversy concerning—and, by amputation, brought certainty to—the statute's reference to "State law." It now is clear that the Longshoremen's Act does not cease to apply when state compensation is available. The irony, however, is that—

—(b) Calbeck Now Has Been Used to Blow "Navigable Waters" Into Uncertainty.

Nothing in *Calbeck*, 370 U. S. 114, gives the slightest hint that the Court intended to modify the statute's provision that it applies "only if the disability or death results from an injury occurring upon the navigable waters." The court below could not point to such hint either, nor could it point to a decision by this Court, or any other, saying that it is an accident "occurring upon the navigable waters" when one drives his automobile off the dock. The court below found that hint (Appendix, p. 23) only by a "clairvoyance" that depends upon a gigantic *non sequitur*. The Court of Appeals said:

> "If *Calbeck* holds (and we think it does) 'that Congress intended the compensation act to have a coverage co-extensive with the limits of its authority,' then there can be no doubt about the outcome of this appeal." (Appendix, p. 23.)[2]

It does not follow from *Calbeck*, as the Court of Appeals mistakenly supposed (Appendix, p. 23), "that the

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[2] The language concerning *Calbeck* is Judge Hutcheson's characterization, in *De Bardeleben Coal Corporation v. Henderson* (5 C. A., 1944), 142 F. 2d 481, 483, of this Court's decision of a quarter century ago in *Parker v. Motor Boat Sales, Inc.* (1941), 314 U. S. 244, quoted in *Calbeck*, 370 U. S. at 130, and refers, *not* to the "navigable waters" limitation of the statute here in question, but to its "State law" provision.

situs of his injury and death was clearly within the scope of admiralty jurisdiction," nor does it follow that Congress intended—if it could—to change admiralty jurisdiction. To the contrary, everything the Court said in *Calbeck* accepts the limitation that the statute applies "*only if* the disability or death results from an injury occurring upon the navigable waters." The Court gave no hint of dissatisfaction with the "simple and easily applied" admiralty rule the courts had for years applied to this provision of the Longshoremen's Act. The courts have uniformly held—

2. "Navigable Waters" Provision Links Act To Rule Defining Admiralty Jurisdiction.

The rule the courts—until now—have applied to the provision making the Longshoremen's Act apply "only if the disability or death results from an injury occurring upon the navigable waters" is the rule fashioned by the courts to define the reach of admiralty jurisdiction.

—(a) Admiralty Rule Is Well-Defined; It Is Solidly Bedded in This Court's Cases.

Two cases from this Court will illustrate the admiralty rule as applied to the problem here before the Court, viz.:

T. Smith & Son, Inc. v. Taylor (1928), 276 U. S. 179, where a longshoreman, engaged in unloading a vessel, *was thrown from the wharf into the water* and drowned. This was *not* within the jurisdiction of admiralty, even though the workman landed in the water and there drowned. Why? Because, said Mr. Justice Butler for a unanimous Court, the blow that brought death (p. 182) "was given and took effect while the deceased was upon the land." The Court (p. 181) applied the

rule: "If the cause of action arose upon the river, the rights of the parties are controlled by maritime law * * *. But, if the cause of action arose upon the land, the state law is applicable."

Minnie v. Port Huron Terminal Co. (1935), 295 U. S. 647, where a longshoreman, engaged in unloading a vessel, *was thrown from the ship's deck to the wharf* and was there injured. This *was* within the jurisdiction of admiralty. Why? Because, said Mr. Chief Justice Hughes for a unanimous Court (p. 648) it was the "blow received on the vessel in navigable water which gave rise to the cause of action, and the maritime character of that cause of action is *not altered* by the fact that the petitioner was thrown from the vessel to the land."

The Court applied this rule to a debarking passenger who fell from the ship's gangplank to the wharf, in *The Admiral Peoples* (1935), 295 U. S. 649. The Court, again unanimous, in an opinion by Mr. Chief Justice Hughes held the case within the jurisdiction of admiralty because the passenger (p. 652) "had not yet left the vessel" and the fact that "she fell on the dock" could not alter the case.

The Court recognized the rule also in *Swanson v. Marra Brothers, Inc.* (1946), 328 U. S. 1, in dealing with a claim, there asserted under the Jones Act, 46 U. S. C. 688, for injury to (p. 2) "a longshoreman * * * *while on a pier* and engaged in loading cargo * * *." The Court, again unanimous except that Mr. Justice Jackson did not participate, pointed out (in an opinion by Mr. Chief Justice Stone, read by Mr. Justice Black) that Congress (p. 5) "has expressed its purpose to *restrict* the liability of the employer under federal statutes to injuries to his em-

ployees *occurring on navigable waters* * * *." Referring to the provision of the Longshoremen's Act now in question, the Court said (p. 7):

> "since this Act is restricted to compensation for injuries occurring on navigable waters, *it excludes* * * * *injuries inflicted on shore.* The Act leaves the injured employees in such cases to pursue the remedies afforded by the local law * * *."

This is the rule that, up to now, has governed the Longshoremen's Act.

—(b) Admiralty Rule Has Uniformly Measured "Navigable Waters" Provision of Statute.

In the nearly four decades that the courts have dealt with the Longshoremen's Act, the uniform course of decision has been that the statute's "navigable waters" provision is to be construed in accordance with the admiralty rule. As the District Court here put it:

> "For the purpose of determining whether an injury occurred upon navigable waters, thus within admiralty jurisdiction and within the scope of the Harbor Workers' Act, the test to be applied is the test of admiralty jurisdiction in tort cases." (Appendix, p. 13.)

To this rule the courts, dealing with the "navigable waters" provision of the Longshoremen's Act, have adhered throughout the life of the Act, as is illustrated by:

L'Hote v. Crowell (5 C. A., 1931), 54 F. 2d 212, 213, reversed on other grounds (1935), 286 U. S. 528, and expressly approved in *The Admiral Peoples* (1935), 295 U. S. 649, 653-654;

Lowe v. Central R. Co. of New Jersey (3 C. A., 1940), 113 F. 2d 413, 415;

American Export Lines, Inc. v. Revel (4 C. A., 1959), 266 F. 2d 82, 84;

Thibodeaux v. J. Ray McDermott & Co., Inc. (5 C. A., 1960), 276 F. 2d 42, 49.

Only in the Sixth Circuit is the rule different.

3. Reasons Assigned by Court of Appeals for Abandoning Admiralty Rule Are Untenable.

The Court below found no case to command its decision. Instead the court said:

> "It seems obvious to us that the trend of case law, the impact of the Admiralty Extension Act, and the effect of *Calbeck* have all pointed in the direction of *expanding the boundaries of admiralty* jurisdiction toward land." (Appendix, p. 23.)

The court erred:

—(a) Decision's "Expanding Boundaries of Admiralty" Rests on Misapprehension.

The three reasons assigned by the Court of Appeals for its decision reveal misapprehension:

1. *Case law.* There is no such trend. The Court of Appeals thought there was because it mistook (Appendix, p. 21) the comments of Gilmore and Black, *The Law of Admiralty* (1957) Chapter 6, Section 6-5, Note 12, page 253, concerning "The radical reconstruction of maritime personal injury law since 1940" to refer to the "navigable waters" provision of the Longshoremen's Act which alone is here in question. The reference the court misunderstood is to the great change wrought in the warranty of seaworthiness and *not* to the "navigable waters" limitation of the Longshoremen's Act. The Gilmore and Black discussion of the Longshoremen's Act begins *80 pages later*

(Section 6-45 to Section 6-53, pages 333-358). Concerning the question "Whether or not the injury occurred *on navigable waters*" Gilmore and Black say (p. 339):

> "that determination could be made in most cases without too much toil and sweat (bearing in mind that while the dock is an extension of the land and not navigable waters, the gangway is an extension of the ship and is navigable waters)."

2. *Admiralty Extension Act.* It is difficult to know what the Court of Appeals could have had in mind. The Admiralty Extension Act, 46 U. S. C. 740, Act of June 19, 1948, c. 526, 62 Stat. 496, says:

> "The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, *caused by a vessel on navigable water,* notwithstanding that such damage or injury be done or consummated on land."

This statute can have no conceivable "impact" in bringing this case under the Longshoremen's Act.[3]

3. *Calbeck.* Nothing in *Calbeck,* 370 U. S. 114, as has been pointed out, touches this case or remotely suggests that this case is (Appendix, p. 23) "within the scope of admiralty jurisdiction" because, as the Court of Appeals thought (Appendix, p. 23), the injury occurred only when the decedent's automobile hit the "navigable waters at the end of the dock."

To the contrary—

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[3] Even if there were a connection between the vessel and the injury, it still would seem to be obvious, as Judge Hoffman held in *Revel v. American Export Lines, Inc.* (E. D. Va., 1958) 162 F. Supp. 279, affirmed in *American Export Lines, Inc., v. Revel* (4 C. A., 1959), 266 F. 2d 82, 84, the Admiralty extension Act cannot be read (162 F. Supp. at 284) "to amend the federal compensation act [*i.e.,* the Longshoremen's and Harbor Workers' Compensation Act] *to include injuries occurring on land* as well as 'upon the navigable waters' * * *."

—(b) This Court Has Three Times Rejected Rule Court of Appeals Here Embraced.

The rule now made law in the Sixth Circuit has three times been urged upon—and rejected by—this Court:

The *first* was in *T. Smith & Son, Inc. v. Taylor* (1928), 276 U. S. 179. The Court was importuned—but the Court rejected the invitation—to adopt the very rule the Court of Appeals in this case has now added to the law. The Court was urged to hold that:

> "regardless of the point of origin of an accident, Admiralty takes jurisdiction where the cause of action *is completed on navigable waters* * * *." [4]

As has been seen, this Court held directly to the contrary.

The *second* time this Court was urged to adopt the rule embraced by the Court of Appeals was in *Vancouver Steamship Co., Ltd. v. Rice* (1933), 288 U. S. 445. A stevedore, hit aboard the vessel by a falling sling of lumber, was taken ashore where he died one hour later. The administratrix (p. 446) "electing under the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. § 933) to assert her claim against a third party, filed a libel in admiralty * * *." This brought objection that admiralty had no jurisdiction because the cause of action depended on the Oregon Wrongful Death Act and therefore did not, and could not, arise (p. 445) "until death actually occurs." Since death came on shore, it was urged (p. 447) "that the cause of action arose on land" and (p. 445) "the admiralty court was without jurisdiction." This Court rejected the argument because (p. 447):

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[4] Brief of plaintiff in error, filed November 7, 1927, No. 186 October Term 1927, p. 12; the same argument in varying forms appears also on pages 2, 4, 5, 9, 26, 36, 38.

"The right to recover for death depends upon the law of the place of the act or omission that caused it *and not upon that of the place where death occurred.*"

The *third* time the rule now adopted in the Sixth Circuit was rejected in this Court was in *Minnie v. Port Huron Terminal Co.* (1935), 295 U. S. 647. A longshoreman was hurled from the deck of a vessel to the wharf. It was argued:

"petitioner had no cause of action *until he struck the wharf.* If a fireman's net had been stretched over the wharf petitioner would have fallen harmlessly into it and would have possessed no cause of action, maritime or otherwise. Likewise if petitioner had been able to land on his feet or hands, or both, he probably, or at least possibly, would not have been actionably injured." [5]

This Court rejected the argument.

Now—after being three times rejected by this Court—the rule that the *place of consummation of the injury* governs, is made law in the Sixth Circuit.

II. RULING BELOW RAISES SERIOUS CONSTITUTIONAL QUESTIONS.

This Court. in sustaining the constitutional validity of the Longshoremen's Act, in *Crowell v. Benson* (1932), 285 U. S. 22, deemed the "fundamental requirements" to be (p. 55):

"that the injury occur upon the navigable waters of the United States and that the relation of master and servant exist. These conditions are indispensable to the application of the statute, not only because the Congress has so provided explicitly (§ 3), but also

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[5] Petitioner's brief, filed February 2, 1935, No. 678, October Term 1934, p. 17.

because the power of the Congress to enact the legislation turns upon the existence of these conditions."

The reason is (p. 55):

"the Congress cannot reach beyond the constitutional limits which are inherent in the admiralty and maritime jurisdiction."

Now, what this Court said the Congress could not write into the statute, the Sixth Circuit has put there.

CONCLUSION.

The decision below is freighted with melancholy consequences for many a longshoreman's claim; it creates uncertainty in the meaning of an immensely important public Act; it establishes one law for Great Lakes and river shipping centered in the Sixth Circuit and leaves another law in effect on the Atlantic, Gulf and Pacific coasts; it raises a seiche that will be felt through all of admiralty jurisdiction beyond the confines of the single Act here before the Court.

The writ should issue.

Respectfully submitted,

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March 23, 1965.

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Office-Supreme Court, U.S.
FILED
MAR 25 1965
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1964.

No. 1017.

THE INTERLAKE STEAMSHIP COMPANY,

Petitioner,

v.

MARCELLA R. NIELSEN, and STEPHEN O'HEARNE, as Successor to JOHN J. NEWMAN, Deputy Commissioner, Administering the Longshoremen's and Harbor Workers' Compensation Act,

Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals For the Sixth Circuit.

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RELEVANT PORTION OF LONGSHOREMEN'S ACT.

Title 33 U. S. C. § 903; Act of March 4, 1927, c. 509, § 3, 44 Stat. 1426.

"§ 903. Coverage.

(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect of the disability or death of—

(1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

(2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.

(b) No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another."

OPINION, FINDINGS, AND ORDER OF DEPUTY COMMISSIONER.

Case No. 208-50.

UNITED STATES DEPARTMENT OF LABOR
BUREAU OF EMPLOYEES' COMPENSATION
Ninth Compensation District.

In the matter of the Claim for Compensation under the Longshoremen's and Harbor Workers' Compensation Act.

MARCELLA R. NIELSEN, widow of
CARL O. NIELSEN, deceased,

Claimant,

against

THE INTERLAKE STEAMSHIP COMPANY,

Self-insured Employer.

COMPENSATION ORDER.
AWARD OF COMPENSATION DEATH BENEFITS.

Such investigation with respect to the above-entitled claim having been made as is considered necessary, and formal hearing having been held in conformity with law, the Deputy Commissioner makes the following

FINDINGS OF FACT:

That on Saturday, January 10, 1959 and Sunday, January 11, 1959, and for sometime before those dates, the deceased Carl O. Nielsen was engaged in maritime employment for the employer as a shipkeeper of the SS ARCTURUS which was then winter-moored to a dock leased by the employer in Maumee Bay, Port of Toledo, Ohio in the Ninth Compensation District established under the provisions of the Longshoremen's and Harbor Workers'

Compensation Act; that the employer had in its employ other employees engaged in maritime employment as shipkeepers; that on said dates the employer was a self-insurer authorized as such under the Act by the Bureau of Employees' Compensation, United States Department of Labor; that the dock at which the SS ARCTURUS was moored was about 1,000 feet long; that said dock was longer than it was wide; that the SS ARCTURUS which was approximately 540 feet long, was moored with her starboard side to the westerly side of the dock with her bow headed in a northerly direction and extending approximately 40 to 50 feet beyond the outer end of the dock; that the forward mooring lines of the ARCTURUS led from the vessel to a bollard on the north end of the dock facing the bay, approximately 50 feet east of the dock edge at which the ARCTURUS lay; that the ARCTURUS' mooring lines consisted of two large manila lines, the bight of a steel mooring cable, an anchor chain that led from a hawse pipe near the stem of the vessel, and also the bights of two steel mooring cables that led from the forepart of the vessel to another bollard 50 feet farther to the eastward of the first-mentioned bollard; that as a shipkeeper for the employer the deceased had access to the dock and to his ship; that there was a roadway, usable and passable for automobiles, that extended from the entrance gate of the dock to the end of the dock facing the bay; that the said dock and the roadway on it provided the path of ingress and egress with respect to the SS ARCTURUS and with respect to the shore end of the vessel's mooring lines; that beginning at about 8 to 10 feet from the outer end of the dock there is a change in the grade of the roadway in the form of a slight incline leading to the outer end of the dock; that access to the ARCTURUS proper was by means of a boarding ladder located toward the after end of the ves-

sel some 380 feet from the outer or bay end of the dock; that the duties of a shipkeeper, including deceased's, are those of a caretaker, and include such custodial duties as seeing that nobody breaks in, that the doors are locked, that there is a light on the outboard side of a vessel for the safety of other ships whenever the bow end of the shipkeeper's vessel extends into navigable waters, seeing that no fires start from smolder as a result of maintenance work done by outside jobbers or otherwise, inspecting the mooring lines and notifying the port captain, his superior in command, if change or adjustment in the mooring lines is made necessary by reason of weather or otherwise; that the lights of an automobile could be of assistance to a shipkeeper in the inspecting of the shore end of the mooring lines; that the responsibility of a shipkeeper for his duties is on a 24 hour per day, 7 day per week basis; that there was provision for the deceased to live aboard the ARCTURUS, with adequate facilities for sleeping, cooking and heating; that employer's shipkeepers, including the deceased, were permitted to leave their vessels on occasions to go to their homes and for meals; that the deceased habitually ate his supper at home, which habit was known to his superior in command and was perfectly agreeable to said port captain; that on the aforesaid Saturday night of January 10, 1959, between 9:00 and 10:00, the deceased, after having had his supper at home, left home by his automobile to proceed to the SS ARCTURUS; that on Monday, January 12, 1959, the body of deceased was recovered from the waters of the bay at the outer end of the dock at which the ARCTURUS was moored; that at the time the body was recovered the deceased was seated in the driver's seat of his automobile with his hands on the wheel and his foot on the brake; that when the body was so recovered the deceased's watch

was stopped at 3:15 o'clock; that said automobile with deceased in it was brought up from the bottom of the bay at the outer end of said dock at a point approximately 25 feet east of that edge of the dock that faced the ARCTURUS; that the top of said recovered automobile was dented in; that the employer did not furnish transportation on the dock between the entrance gate and the outer or bay end; that shipkeepers of the employer, including deceased, as a matter of convenience did, from time to time, travel to and from work by means of private automobile; that the weather on the evening of January 10, 1959 and the early morning hours of January 11, 1959 was clear and cold, with frost; that in the early morning hours of Sunday, January 11, 1959 the aforesaid Carl O. Nielsen suffered injury when, striking the aforesaid mooring lines enroute, he drove his car over and off the outer end of the dock and into the ice and water of the aforesaid Maumee Bay; that as a result of said injury the aforesaid Carl O. Nielsen sustained skull fractures and brain damage which caused his death in the early morning hours of January 11, 1959; that at and before the time of the aforesaid injury the said Carl O. Nielsen had been suffering from heart disease but that said heart disease was not responsible for his death nor did it play any part in his death; that shortly before his death the said Carl O. Nielsen had imbibed some six to eight ounces of whiskey but had not thereby lost control of his senses and the fatal injury was not occasioned solely by the intoxication of the employee; that the aforesaid fatal injury occurred on navigable waters of the United States; that said fatal injury arose out of and in the course of deceased's employment for the employer; that at the time of the fatal injury the average weekly wage of the deceased was in excess of $81.00 per week; that notice of the fatal injury

was not given within thirty days, but that the employer had knowledge of the fatal injury and the employer has not been prejudiced by failure to give notice; that the employer made no report of the fatal injury to the Bureau or official charged with the administration of the Longshoremen's and Harbor Workers' Compensation Act; that on behalf of herself as widow and on behalf of Carl O. Nielsen, Jr. and Michael C. Nielsen as minor children of the deceased, Marcella R. Neilsen filed due claim for compensation death benefits as a result of the fatal injury; that the said Marcella R. Neilsen was born on July 16, 1920, was married to the deceased on February 14, 1948, and is the widow of the deceased entitled to compensation death benefits on her own behalf of $28.35 per week, and to compensation death benefits on behalf of the aforesaid two minor children of deceased at the rate of $12.15 per week for each child, making a total compensation death benefit of $52.65 per week; that the said minor child Carl O. Nielsen, Jr. was born October 10, 1948; that the said minor child Michael C. Nielsen was born on December 9, 1952; that the said widow Marcella R. Neilsen paid the burial bill in the amount of $1,149.34; that the employer is liable for funeral expenses of deceased not to exceed $400.00; that from January 12, 1959 to December 23, 1962 inclusive, a period of 206 weeks, there has accrued compensation death benefits amounting to $10,845.90, none of which has been paid; that J. Harold Traverse is the attorney for the claimant; that an amount of $2,750.00 is approved as a fee for legal services rendered to the claimant.

Upon the foregoing facts the Deputy Commissioner makes the following

AWARD:

That the employer The Interlake Steamship Company shall pay to the claimant an amount of $400.00 on account of the funeral expenses;

That the employer The Interlake Steamship Company shall pay to the claimant the accrued compensation of $10,845.90, less an amount of $2,750.00 which is to be deducted from the aforesaid $10,845.90 and paid directly to J. Harold Traverse, Attorney, making a net amount payable to the claimant at this time of $8,095.90;

That effective December 24, 1962 the employer The Interlake Steamship Company shall pay to the claimant, periodically, compensation death benefits at the rate of $52.65 per week, said periodic payments to continue in accordance with the provisions of the Longshoremen's and Harbor Workers' Compensation Act.

Given under my hand at Cleveland, Ohio this 26th day of December, 1962.

JOHN J. NEWMAN,

Deputy Commissioner,
Ninth Compensation District.

OPINION OF THE DISTRICT COURT.

No. C 63-45.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO
EASTERN DIVISION.

THE INTERLAKE STEAMSHIP COMPANY,

Plaintiff,

vs.

JOHN J. NEWMAN, Deputy Commissioner etc., and MARCELLA R. NIELSEN,

Defendants.

MEMORANDUM OPINION.

JONES, *J.*:

Plaintiff, The Interlake Steamship Company, filed a complaint for the purpose of reviewing, suspending and setting aside an order for the payment of death compensation made by defendant John J. Newman, Deputy Commissioner, by virtue of the authority conferred upon him by the provisions of the Longshoremen's and Harbor Workers' Compensation Act, Title 33 U. S. C. A., Sections 901-950. The matter now has come on for final determination after oral hearing on motions for summary judgment filed by each defendant. The following is a summary of the Deputy Commissioner's findings of fact and conclusions of law as to the death of Carl O. Nielsen.

Carl O. Nielsen, the deceased, was employed by the plaintiff as a shipkeeper on the SS ARCTURUS. His duties were on a twenty-four hour per day, seven days per week, basis. The deceased was permitted to go home for meals,

but he would sleep on board ship. On Saturday night, January 10, 1959, between 9:00 and 10:00 p.m., the deceased left home after supper. His body was found on Monday, January 12, 1959, behind the wheel of his car in twenty-five feet of water east of the edge of the dock where the ARCTURUS was moored. The top of his car was caved in, and as a result of his car landing upside down on the ice, the decedent suffered a fractured skull.

The dock at which the ARCTURUS was moored was about 1,000 feet long, the ARCTURUS was approximately 540 feet long, and moored so that about 50 feet of her bow extended beyond the outer end of the dock. The forward mooring lines led from the ship to bollards on the end of the dock, 50 feet and 100 feet from the edge of the dock at which the ARCTURUS lay. A roadway on the dock was used by the decedent to drive to his ship. The decedent would board the ARCTURUS by a boarding ladder some 380 feet from the bay end of the dock.

The duties of the decedent as shipkeeper included such custodial duties as seeing that nobody broke in, that doors were locked, lights were on on the outboard side of the ship, seeing no fires started, and inspecting mooring lines. The Commissioner found that the lights of an auto could be of assistance to the shipkeeper in inspecting the shore end of the mooring lines.

The Commissioner found that in the early morning hours of Sunday, January 11, 1959, the decedent suffered injury when, striking the mooring lines enroute, he drove his car over and off the outer end of the dock into ice and water. As a result, the decedent sustained a skull fracture and brain damage which caused his death. The deceased suffered from a heart disease but the disease was not responsible for his death nor did it play any part in his death. Shortly before his death, the decedent imbibed

some six to eight ounces of whiskey, but had not thereby lost control of his senses, and the fatal injury was not occasioned solely by his intoxication. The Commissioner further found that the fatal injury occurred on navigable waters and arose out of and in the course of his employment.

The Commissioner found for Marcella Nielsen, the widow, in the amount of $10,845.90, accrued compensation and $400 for accrued funeral expenses. After denying plaintiff's motion for an interlocutory injunction, these amounts were paid to the defendant, Marcella Nielsen. The decedent had two minor children.

The plaintiff opposes defendants' motions for summary judgment on two grounds. First, plaintiff asserts that Carl Nielsen's death did not arise out of his employment as required by Section 902(2) of the Longshoremen's and Harbor Workers' Compensation Act. Secondly, the plaintiff asserts that Carl Nielsen's death did not occur upon the navigable waters of the United States as required by Section 903(a) of the Act.

The Deputy Commissioner's finding that the decedent's death arose out of and in the course of his employment cannot be disturbed. Section 920 of the Act creates a presumption that the claim comes within the provisions of the Act. However, if the employer has offered evidence to show that the injury did not arise out of the employee's employment, then the presumption falls out of the case. If the evidence permits an inference either way, the Deputy Commissioner alone is empowered to draw the inference. His decision as to the weight of the evidence may not be disturbed. *Del Vecchio v. Bowers,* 296 U. S. 280 (1935); *Marra Bros. v. Cardillo,* 154 F. 2d 357 (1946). The facts that Carl Nielsen drove his car onto the dock to a point where he boarded his ship, some 380 feet from the

bay end of the dock, every evening; that he was on twenty-four hour duty; that one of his duties was to inspect the mooring lines are substantial findings of fact to support the inference made by the Deputy Commissioner that his death arose out of and in the course of his employment.

As a matter of independent judgment, I would not make this inference. However, as the Supreme Court held in *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U. S. 504 (1951), even though the evidence did not compel the inference made by the Deputy Commissioner, the findings should be accepted unless they are unsupported by substantial evidence on the record considered as a whole.

Further, the standard applied by the Supreme Court in the *O'Leary* case was a most liberal one. There the court said:

> "Workmen's compensation is not confined by common-law conceptions of scope of employment. The test of recovery is not a causal relation between the nature of the employment of the injured person and the accident. Nor is it necessary that the employee be engaged at the time of the injury in activity of benefit to employer. All that is required is that the 'obligations or conditions' of employment create the 'zone of special danger' out of which the injury arose."

The finding then of the Deputy Commissioner is conclusive on this issue even though the evidence permitted conflicting inferences.

The Deputy Commissioner found that Carl Nielsen's death resulted from an injury occurring upon the navigable waters of the United States. Section 19(a) of the Act gives the Deputy Commissioner "full power and authority to hear and determine all questions in respect of" claims for compensation. Section 21(b) gives the Federal District Courts power to suspend or set aside, in whole or in

part, compensation orders if "not in accordance with the law."

Ever since *Crowell v. Benson,* 285 U. S. 22 (1932), was decided, the majority of the courts have rejected the application of the doctrine that the findings of the Commissioner could not be deemed conclusive when they related to facts on which the jurisdiction of the board to act in the first place depended. Thus the courts have left jurisdictional facts subject to the same review that is applied to all facts. That is, the Commissioner's order may be reversed only if it is not in accordance with the law, i.e., not supported by substantial evidence. *O'Leary v. Brown-Pacific-Maxon, Inc., supra; Norton v. Warner,* 321 U. S. 565 (1944). *Crowell v. Benson* suggests a distinction between the treatment of statutory and constitutional jurisdictional facts. The constitutional fact issue arises when Congress, in a piece of legislation, has pushed its constitutional powers to the limit. The Crowell decision held the Longshoremen's and Harbor Workers' Act

> "does not expressly preclude the court, in proceedings to set aside an order as not in accordance with law, from making its own examination and determination of facts whenever that is necessary to enforce constitutional rights. * * *"

However, it is not necessary here to determine what validity remains in the Crowell decision as to the scope of judicial review of a finding that an injury occurred on navigable waters. It is my considered judgment that, as a matter of law, the undisputed facts found by the Deputy Commissioner do not support the Commissioner's finding that the injury occurred upon navigable waters.

For the Act to apply, the employee must be injured under the same conditions concerning locality which are required to be found as the basis of admiralty jurisdiction

in tort generally. Comparing *Smith v. Taylor*, 276 U. S. 179 (1927), decided before the passage of the Federal Workmen's Compensation Act, with *Minnie v. Port Huron Terminal Co.*, 295 U. S. 647 (1935), decided after the passage of the Act, it is seen that the test of locality played the same part in the State compensation case that it did in the determination of tort jurisdiction in admiralty. For the purpose of determining whether an injury occurred upon navigable waters, thus within admiralty jurisdiction and within the scope of the Harbor Workers' Act, the test to be applied is the test of admiralty jurisdiction in tort cases. *Ford v. Parker*, 52 F. Supp. 98 (1943), and *L'Hote v. Crowell*, 54 F. 2d 212 (1932), reversed on other grounds in 286 U. S. 529 (1932), where the court cites and follows *Smith v. Taylor* and *The Strabo*, 90 Fed. 110 (1898), affirmed 98 Fed. 998 (1900).

The test of admiralty jurisdiction in tort cases has had a long and conflicting history. It is not necessary for me to review the early history for this has been well done by Judge Thomas in *The Strabo, supra.* In that case the workman attempted to leave the ship by means of a ladder. Because of the master's negligence, the workman fell and was thrown to the dock and injured.

The place of injury as the test for admiralty jurisdiction was rejected by Judge Thomas when he said:

> "It does not seem that it was the intention in the latter cases to lay down the rule that the physical injury must be completed on the water to give courts of admiralty jurisdiction, irrespective of the locality where the breach of duty first operated upon the person injured."

Since the whole wrongful agency was put in motion and took effect on the ship, the court held there was admiralty jurisdiction.

The place of culmination of an injury, whether it be by drowning or by striking the dock, is not determinative of whether admiralty has jurisdiction. *Smith v. Taylor, supra, Minnie v. Port Huron Terminal Co., supra,* and *Admiral Peoples,* 295 U. S. 649 (1935). Nor is it determinative that the breach of duty originated on the ship, *Smith v. Taylor, supra.* The test for admiralty jurisdiction, which in a difficult and close case makes the most sense and is the least arbitrary, is the test laid down by Judge Thomas in *The Strabo* case when he said:

> "The more consistent rule seems to be that a court of admiralty has jurisdiction when the negligent act or omission, wherever done or suffered, takes effect, and produces injury to the person or property of another, on navigable waters."

Stated another way, jurisdiction in admiralty depends upon the locality of the injury, and locality of the injury is the "locality where the breach of duty first operated upon the person injured." *The Strabo.* This case has been cited and followed in *L'Hote v. Crowell* and *Admiral Peoples, supra.*

In a compensation case where we are not concerned with breach of duty, I think the test must be that if the impetus which put in motion the sequence of events resulting in the fatal accident came from the land, and operated on the person injured while on land, then there can be no jurisdiction and no valid award.

This view of the matter is further fortified by the reaction of the court as evidenced by a question propounded to Government counsel during oral argument, which was in substance, "if a harbor worker such as Carl Nielsen were working on the deck of a moored vessel and through no fault upon the part of the employer, but by mischance, fell from the deck to the dock, would the in-

jury have occurred on navigable water or upon the land, for the purpose of this Act?" In my judgment it would have been an injury occurring upon navigable water, and covered by the Act.

Being mindful of the broad purposes of the Act, and the liberal construction to be given its provisions, together with the weight residing in the Deputy Commissioner's findings of fact, it is my considered judgment that assuming facts as found by the Commissioner to be true, they do not support the legal conclusion that Carl Nielsen's fatal injury occurred upon navigable waters of the United States.

Carl Nielsen drove off the dock and crushed his skull on the ice below. Whatever the reason that caused him to drive off the dock, whether in the performance of his duties as the Commissioner found, or whether he was negligent or intoxicated, the occurrence or the condition that initiated and brought about the fatal accident occurred on the dock.

Since this was not an injury occurring upon navigable waters, the Commissioner was without jurisdiction to make a valid award.

Therefore, it is ordered that defendants' motions for summary judgment are hereby denied, and judgment is entered for the plaintiff on its complaint to suspend and set aside the compensation order.

It is further ordered that a permanent injunction be issued restraining the Deputy Commissioner from further enforcing the compensation order, award of death benefits, and that no further payments to the claimant under the Deputy Commissioner's order shall be required to be made by the plaintiff.

It is also ordered that a mandatory injunction be issued directing the Deputy Commissioner to set aside the

findings of fact heretofore made, and that the Deputy Commissioner make an order dismissing and disallowing the claim of defendant Marcella R. Nielsen.

JONES,
United States District Judge.

September 12, 1963.

SUPPLEMENTAL OPINION OF THE DISTRICT COURT.

JONES, *J.*:

Although the memorandum heretofore filed, dated September 12, 1963, contains reference to authorities relied upon to support the conclusion reached, it does not succinctly state my interpretation of the Longshoremen's and Harbor Workers' Compensation Act, and perhaps my judgment better would be understood if it were supplemented by the following.

The Compensation Act applies to a longshoreman or harbor worker injured while engaged in the performance of some duty on navigable waters and while acting within the scope of his employment. The decedent here was performing no duty on navigable waters and from what he did it could not conceivably be inferred that he had any purpose or intention of doing anything, or going, upon navigable waters at the time of his fatal injury.

JONES,
United States District Judge.

September 16, 1963.

OPINION OF THE COURT OF APPEALS.

Nos. 15705-15706

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 15705

THE INTERLAKE STEAMSHIP COMPANY,

Plaintiff-Appellee,

v.

MARCELLA R. NIELSEN,

Defendant-Appellant.

No. 15706

THE INTERLAKE STEAMSHIP COMPANY,

Plaintiff-Appellee,

v.

STEPHEN O'HEARNE, as successor to JOHN J. NEWMAN, Deputy Commissioner Administering the Longshoremen's and Harbor Workers' Compensation Act,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Ohio.

Decided December 3, 1964.

Before: WEICK, Chief Judge, EDWARDS, Circuit Judge, and PRETTYMAN, Senior Circuit Judge.[1]

---

[1] Senior Circuit Judge E. Barrett Prettyman of the District of Columbia Circuit sitting by designation.

EDWARDS, Circuit Judge. The claimant-appellant in this appeal is the wife of the deceased shipkeeper of the SS ARCTURUS, owned by The Interlake Steamship Company, appellee.

The ARCTURUS was berthed for the winter of 1959 at a Lake Erie dock. In the course of his employment decedent drove his car off the end of the dock where his ship was berthed. He died of a skull fracture occasioned by impact upon the frozen waters of Lake Erie. Lake Erie is, of course, part of the navigable waters of the United States of America and hence part of its admiralty jurisdiction.

Here an award of compensation under the Longshoremen's and Harbor Workers' Compensation Act was entered after hearing by a Deputy Commissioner. Interlake thereupon brought proceedings to attack the compensation award before the United States District Court for the Northern District of Ohio. After hearing the District Judge set the award aside on the sole ground that the fatal injury did not occur upon "navigable waters."

As we see this case, decedent broke his skull on that very substance.

Decedent Nielsen had as part of his responsibility checking the mooring lines of his vessel both day and night, and the testimony at hearing before the Deputy Commissioner administering the Longshoremen's and Harbor Workers' Compensation Act indicated that he frequently did this by automobile on the roadway on the dock. The ARCTURUS was 550 feet long, and she was berthed so that 50 feet of her bow extended beyond the end of the dock.

Nielsen, as sole custodian of the ship, was on duty twenty-four hours per day. He slept on board; but was allowed to go home for his meals.

On the night of January 10, 1959, Nielsen left home after supper. His body was found Monday, January 12, behind the wheel of his car in 25 feet of water beyond the end of the dock where the SS ARCTURUS was berthed. The top of his car was caved in as a result of landing upside down on the ice and an autopsy showed that Nielsen had died as a result of a fractured skull.

The hearing developed no other decisive facts, and the Deputy Commissioner found that Nielsen had been killed in the course of his employment. This finding is uncontested on this appeal.

On review before the United States District Court the Interlake Steamship Company contended, among other things, that the award was invalid since the injury did not take place within the admiralty jurisdiction of the United States of America.

This proceeding resulted in the adverse finding by the District Judge to which we have referred.

The applicable statutory provision is:

> "§ 903. *Coverage*
>
> "(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any drydock) * * *." 33 U. S. C. § 903(a).

If this language and the observation with which we have opened this opinion seem simple, nothing else about the interpretation of this statute is.

In our present case the District Judge in reciting the facts said: "Carl Nielsen drove off the dock and crushed his skull on the ice below." But he also found as a matter of law that these stark facts put Nielsen outside of admiralty jurisdiction:

> "In a compensation case where we are not concerned with breach of duty, I think the test must be that if the impetus which put in motion the sequence of events resulting in the fatal accident came from the land, and operated on the person injured while on land, then there can be no jurisdiction and no valid award."

In this holding the District Judge relied upon a series of cases wherein under quite different fact situations judicial language could be read as giving support to his view. *The Admiral Peoples,* 295 U. S. 649 (1935); *L'Hote v. Crowell,* 54 F. 2d 212 (C. A. 5, 1931), *reversed on other grounds,* 286 U. S. 528 (1935); *Minnie v. Port Huron Terminal Co.,* 295 U. S. 647 (1935); *Smith & Son v. Taylor,* 276 U. S. 179 (1928); *The Strabo,* 98 Fed. 998 (C. A. 2, 1900).

Of these cases, two were actions based on events which preceded the effective date of the Longshoremen's and Harbor Workers' Compensation Act in 1927. All preceded adoption of the Admiralty Extension Act in 1948.[2] All preceded the latest authoritative statement of the United States Supreme Court concerning admiralty jurisdiction as applicable to the Longshoremen's and Harbor Workers' Compensation Act in *Calbeck v. Travelers Insurance Co.,* 370 U. S. 114 (1962).

It should also be noted that four out of five of these same cases actually upheld admiralty jurisdiction. In the other case, *Smith & Son v. Taylor, supra,* the court's opinion affirmed a state compensation award (no federal act then being effective). The holding denied that "the case is *exclusively* within admiralty jurisdiction" as claimed by appellants therein. *Smith & Son v. Taylor, supra* at 182. (Emphasis added.)

---

[2] Title 46 U. S. C. 740.

We also note that there are cited to us a series of somewhat more modern cases which support appellant's view to a greater or lesser degree. *Thomson v. Bassett*, 36 F. Supp. 956 (W. D. Mich. 1940), *aff'd without opinion*, 1942 Am. Mar. Cas. 184; *Pure Oil Company v. Snipes*, 293 F. 2d 60 (C. A. 5, 1961); *Weinstein v. Eastern Airlines, Inc.*, 316 F. 2d 758 (C. A. 3, 1963), *cert. denied*, 375 U. S. 940 (1964). None of these, however, is directly in point; and these, too, may suffer from some legal obsolescence as a result of the factors noted above.

Even before the *Calbeck* decision textwriters on admiralty had noted the obsolescence of many older precedents in the case law pertaining to longshoremen's and dock workers' injuries:

> "The radical reconstruction of maritime personal injury law since 1940 has made much of the older case law of little more than antiquarian interest. The volume of personal injury litigation since 1945, and particularly since 1950, has been so great that exhaustive citation of recent lower court cases would be an almost impossible task. These cases were decided against a rapidly changing background and many of them were of merely transitory interest; since the Supreme Court has claimed the field of maritime personal injury litigation as its own, lower court decisions have suffered from rapid technological obsolescence. Thus exhaustive citation to them would be fruitless and unhelpful. * * *" [3]

While the Admiralty Extension Act of 1948 obviously was not designed directly to affect the Longshoremen's and Harbor Workers' Compensation Act, it did serve to make clear that admiralty jurisdiction could extend to damage

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[3] GILMORE and BLACK, The Law of Admiralty (1957), Chapter 6, Rights of Seamen and Maritime Workers; Recovery for Death and Injury, sec. 6-5, n. 12, page 253.

caused on land by maritime events, although early case law had held to the contrary. (See *Cleveland Terminal & Valley R. R. Co. v. Cleveland Steamship Co.*, 208 U. S. 316 (1908); *State Industrial Commission of New York v. Nordenholt Corp.*, 259 U. S. 263 (1922)).

Much more to the point in our instant situation is the latest authoritative interpretation of the extent of admiralty jurisdiction under the Longshoremen's and Harbor Workers' Compensation Act made by the United States Supreme Court in *Calbeck v. Travelers Insurance Co., supra.*

Discussing this statute the Court said:

> "There emerges from the complete legislative history a congressional desire for a statute which would provide federal compensation for all injuries to employees on navigable waters"; *Calbeck v. Travelers Insurance Co., supra* at 120. (Footnote omitted.)

The Supreme Court opinion in Calbeck then quoted with approval a Fifth Circuit Court opinion [*DeBardeleben Coal Corp. v. Henderson,* 142 F. 2d 481 (C. A. 5, 1944)] commenting on the "State law" provision:

> "'* * * It is sufficient to say that Congress intended the compensation act to have a coverage coextensive with the limits of its authority and that the provision "if recovery * * * may not validly be provided by State law" was placed in the act not as a relinquishment of any part of the field which Congress could validly occupy but only to save the act from judicial condemnation, by making it clear that it did not intend to legislate beyond its constitutional powers. * * * In the application of the act, therefore, the broadest ground it permits of should be taken.'" *Calbeck v. Travelers Insurance Co., supra* at 130.

The Court then reached a conclusion which we read as rejecting many of the past decisions dealing with the limits of state versus admiralty jurisdiction:

> "In sum, it appears that the Longshoremen's Act was designed to ensure that a compensation remedy existed for all injuries sustained by employees on navigable waters, and to avoid uncertainty as to the source, state or federal, of that remedy. Section 3(a) should, then, be construed to achieve these purposes." *Calbeck v. Travelers Insurance Co., supra* at 124.

It seems obvious to us that the trend of case law, the impact of the Admiralty Extension Act, and the effect of *Calbeck* have all pointed in the direction of expanding the boundaries of admiralty jurisdiction toward land. It does not require any great clairvoyance to hold that at present admiralty jurisdiction clearly encompasses the navigable waters immediately adjacent to a dock.[4]

If *Calbeck* holds (and we think it does) "that Congress intended the compensation act to have a coverage coextensive with the limits of its authority," then there can be no doubt about the outcome of this appeal. No one asserts that claimant was killed (or injured) until the impact on the frozen substance of the navigable waters at the end of the dock. The fact which impressed the District Judge—that the impetus which propelled claimant onto the ice had a land-based origin—does not alter the fact that the situs of his injury and death was clearly within the scope of admiralty jurisdiction.

Reversed for entry of a compensation order in accordance with the award of the Deputy Commissioner.

---

[4] In this regard we have considered and rejected language relied upon by appellee from *Atlantic Stevedoring Co. v. O'Keeffe*, 220 F. Supp. 881 (S. D. Ga. 1963), finding this District Court opinion neither binding nor persuasive.

JUDGMENT OF THE COURT OF APPEALS (No. 15,705).

(Filed Dec. 3, 1964.)

Appeal from the United States District Court for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Ohio, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed for entry of a compensation order in accordance with the award of the Deputy Commissioner.

It is further ordered that defendant-appellant recover from plaintiff-appellee the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.
s/ CARL W. REUSS,
Clerk.

JUDGMENT OF THE COURT OF APPEALS (No. 15,706).

(Filed Dec. 3, 1964.)

Appeal from the United States District Court for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Ohio, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed for entry of a compensation order in accordance with the award of the Deputy Commissioner.

It is further ordered that defendant-appellant recover from plaintiff-appellee the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.
s/ CARL W. REUSS,
Clerk.

ORDER OF THE COURT OF APPEALS DENYING PETITION FOR REHEARING (Nos. 15705-06).

(Filed January 12, 1965.)

Before: WEICK, Chief Judge, EDWARDS, Circuit Judge, and PRETTYMAN, Senior Circuit Judge.

On consideration of the petition for rehearing filed in the above-styled matter, and the brief filed in support thereof, said petition is hereby DENIED.

ENTERED BY ORDER OF THE COURT:
s/ CARL W. RUESS,
Clerk.

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FILED
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JOHN F. DAVIS, CLERK

No. 1017

In the Supreme Court of the United States

OCTOBER TERM, 1964

THE INTERLAKE STEAMSHIP COMPANY, PETITIONER

v.

MARCELLA R. NIELSEN and STEPHEN O'HEARNE, DEPUTY COMMISSIONER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT O'HEARNE, DEPUTY COMMISSIONER, IN OPPOSITION

ARCHIBALD COX,
Solicitor General,

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BRIEF FOR THE RESPONDENT O'HEARNE, DEPUTY COMMISSIONER, IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 17-23) is reported at 338 F. 2d 879. The opinions of the district court (Pet. App. 8-16) and the findings and award of the Deputy Commissioner (Pet. App. 2-7) are unreported.

JURISDICTION

The judgments of the court of appeals were entered on December 3, 1964 (Pet. App. 24-25), and a timely

petition for rehearing was denied on January 12, 1965 (Pet. App. 25). The petition for a writ of certiorari was filed on March 25, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals properly sustained the Deputy Commissioner's determination that the death of a shipkeeper resulting from a skull fracture occasioned by impact on the frozen waters of Lake Erie after the decedent drove his car off the end of a dock was "an injury occurring upon the navigable waters of the United States" compensable under the Longshoremen's and Harbor Workers' Compensation Act.

STATUTE INVOLVED

The Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. 901, *et seq.*, provides in pertinent part (as it appears in the United States Code):

> § 902 [Section 2 of the Act]. *Definitions.*
>
> When used in this chapter—
>
> * * * *
>
> (2) The term "injury" means accidental injury or death arising out of and in the course of employment * * *.
>
> * * * *
>
> (4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the

navigable waters of the United States (including any dry dock).

* * * *

§ 903 [Section 3 of the Act]. *Coverage.*

(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. * * *

* * * *

§ 920 [Section 20 of the Act]. *Presumptions.*

In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this chapter.

* * * *

§ 921 [Section 21 of the Act]. *Review of compensation orders.*

* * * *

(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order * * *.

STATEMENT

The facts were found by the Deputy Commissioner (Pet. App. 2-6) and are undisputed here.

In January 1959, Carl O. Nielsen was employed by petitioner as a shipkeeper of the SS ARCTURUS, which was then winter-moored to a wharf in Maumee Bay, Port of Toledo, Ohio. Petitioner was a self-insurer under the Longshoremen's and Harbor Workers' Compensation Act, and had other employees engaged in maritime employment. The shipkeeper's duties were on a twenty-four-hour-a-day, seven-day-a-week basis, and included inspections of the ship and its mooring lines. The lights of an automobile were useful to the shipkeeper in inspecting the shore end of the lines. Although there were facilities for the shipkeeper to sleep and eat aboard ship, Nielsen habitually ate his supper at home, with the acquiescence of his superiors.

Between 9 and 10 p.m., on January 10, 1959, after having had his supper at home, Nielsen left by automobile for the ARCTURUS. He apparently drank from six to eight ounces of whiskey, but did not lose control of his senses (Pet. App. 4-5).

In the early morning hours of January 11, 1959, while driving between the entrance gate of the wharf and its outer end, his car struck the mooring lines, and went over and off the wharf into the ice and water. As a result of that accident, he sustained skull fractures and brain damage which caused his death. His body was recovered from the waters of the bay the next day (Pet. App. 4-5).

Nielsen's widow filed a claim for compensation benefits under the Longshoremen's Act for herself and their two children.[1] After having found the facts as set forth above, the Deputy Commissioner concluded that the injury arose out of and in the course of Nielsen's employment, that it was not occasioned solely by his intoxication, and that it occurred on the navigable waters of the United States (Pet. App. 5). Accordingly, he entered an award in favor of the widow in the amount of $28.35 per week, plus $12.15 per week for each minor child for a total of $52.65 per week[2] (Pet. App. 6-7).

The employer, as self-insurer, brought suit in the district court under Section 21 of the Longshoremen's Act, 33 U.S.C. 921, *supra*, p. 3, seeking to have the compensation order set aside on the grounds (1) that Nielsen's death did not arise out of his employment, and (2) that the injury was not compensable under the Longshoremen's Act[3] because his

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[1] The record does not suggest that she filed a claim for compensation under the Ohio Workmen's Compensation Act, and we are advised by her counsel that no such claim was in fact filed.

[2] Unlike the Ohio statute, which would have limited recovery for Nielsen's death to $18,000 (Ohio Revised Code § 4123.59(B); Pet. 3), the Longshoremen's Act imposes no ceiling for death or total and permanent disability benefits. 33 U.S.C. 914(m). Under the compensation order in this case, it is estimated (on the premise of no remarriage and the widow's life expectancy to 74) that Nielsen's widow and children will receive a gross amount of approximately $68,000. 33 U.S.C. 909 (b).

[3] Petitioner asserts that "The Ohio statute clearly would cover the death here in question." Pet. 3. But, as noted above,

death did not occur "upon navigable waters of the United States" within the meaning and coverage of that Act. The district court sustained the Deputy Commissioner's finding that the death arose out of and in the course of his employment (Pet. App. 10-11). The court set aside the award as unlawful, however, ruling that the injury was not one occurring upon navigable waters within the meaning of the Longshoremen's Act because "the impetus which put in motion the sequence of events resulting in the fatal accident came from the land, and operated on the person injured while on land" (Pet. App. 14, 12-15). In a supplemental opinion, the court added as a reason for setting aside the award the fact that Nielsen "was performing no duty on navigable waters" and had no "purpose or intention of doing anything, or going, upon the navigable waters at the time of his fatal accident" (Pet. App. 16).

The court of appeals reversed. Noting that the district court had set aside the Deputy Commissioner's award solely on the ground that the fatal injury did not occur upon navigable waters, the court stated (Pet. App. 18), "As we see this case, decedent broke his skull on that very substance." Noting that the decedent was not "killed (or injured) until the impact on the frozen substance of the navigable waters at the end of the dock," the court ruled that the land-

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Mrs. Nielsen apparently did not file any written claim for State compensation benefits. Accordingly, the Ohio statute of limitations would appear to bar recovery under the Ohio Act. Ohio Revised Code, § 4123.84.

based origin of the impetus did "not alter the fact that the situs of his injury and death was clearly within the scope of admiralty jurisdiction." Pet. App. 23.

ARGUMENT

This case presents the single narrow question of whether the deputy commissioner may award compensation under the Longshoremen's Act for an injury (and resulting death) to a maritime worker which was sustained upon the navigable waters of the United States, although the impetus for the accident operated upon him while he was upon a wharf. The court's decision upholding the compensation award is in accord with the settled principles established by prior decisions of this Court under the Longshoremen's Act. There is no conflict between circuits, and no occasion for review by this Court.

Section 3 of the Longshoremen's Act (33 U.S.C. 903, *supra*, p. 3) provides that the Act is applicable to an "injury occurring upon the navigable waters of the United States." In *Calbeck* v. *Travelers Insurance Co.*, 370 U.S. 114, 116, 117, this Court ruled that the Longshoremen's Act was intended "to provide compensation for *all* injuries sustained by employees on navigable waters whether or not a particular injury might also have been within the constitutional reach of a state workmen's compensation law" (emphasis added). In this case the Act was applicable because the injury and death occurred upon the ice and in the navigable waters of Lake Erie.

Petitioner contends, however, that the admiralty jurisdiction, and hence the Longshoremen's Act, does not extend to an injury which occurs as a result of a land-based impetus which takes effect while the employee is on land or on a wharf, even though the injury is actually sustained and consummated upon the navigable waters (Pet. 11-14). While the rule urged by petitioner may appear "simple and easily applied" to experienced admiralty practitioners, it is, to say the least, a little difficult to explain to an injured maritime worker, or his survivors, why any injury taking place wholly upon and in the navigable waters of Lake Erie is not an injury "occurring upon the navigable waters of the United States" within the meaning and coverage of the Longshoremen's Act.[4] Any such artificial and technical restriction imposed on the natural meaning of the Act's coverage provisions would tend to defeat its purpose of providing a speedy, certain and inexpensive remedy. *Calbeck* v. *Travelers Insurance Co.*, *supra*; *Davis* v. *Department of Labor*, 317 U.S. 249, 254.

Petitioner relies primarily upon *Smith & Son* v. *Taylor*, 276 U.S. 179, for what it contends is the established rule. In that case, which involved events occurring before the enactment of the Longshoremen's Act, the Court sustained an award of State

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[4] It has been settled since *The Plymouth*, 3 Wall. 20, 34-35, that admiralty tort jurisdiction depends upon the place of "the substance and consummation" of the injury rather than upon the place of the origin of the wrong. Thus, "where the negligent act originates on land and the damage occurs on water, the cause of action is within the admiralty jurisdiction." *Smith* v. *Lampe*, 64 F. 2d 201, 202 (C.A. 6).

workmen's compensation benefits for a longshoreman who was struck by cargo while on the wharf, and knocked into navigable waters where he drowned. In this case, however, the maritime worker was not struck while on the wharf, so that there was no injury occurring there.[5] Moreover, as the court of appeals noted (Pet. App. 20), *Smith* v. *Taylor* merely sustained the constitutionality of the award of State workmen's compensation benefits by holding that the injury was not "exclusively" within admiralty jurisdiction. 276 U.S. at 182.[6] Thus, here, the land-based origin of the impetus may well have been sufficient to sustain an award of State compensation, but the fact that the injuries were sustained upon the navigable waters is also sufficient to bring them within the Longshoremen's Act, which in terms applies to injuries "occurring upon the navigable waters of the United States." Sec. 3, 33 U.S.C. 903(a).[7]

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[5] Accord: *Thomson* v. *Bassett*, 36 F. Supp. 956 (W.D. Mich.) (sustaining Longshoremen's Act coverage where a worker fell off a wharf into the water). Compare, *Atlantic Stevedoring Co.* v. *O'Keefe*, 220 F. Supp. 881 (S.D. Ga.), pending on appeal, C.A. 5, No. 21770.

[6] As such, the decision probably should be read as a precursor to the twilight zone doctrine later articulated in *Davis* v. *Department of Labor*, 317 U.S. 249. See, *infra*, p. 11. The Second Circuit has recently joined the Sixth Circuit in giving *Smith & Son* v. *Taylor* such a reading. *Michigan Mutual Liability Co.* v. *Arrien* (C.A. 2, No. 29241, April 5, 1965).

[7] As petitioner concedes (Pet. 10), this Court's decision in *Calbeck* v. *Travelers Insurance Co.*, 370 U.S. 114, makes it clear that the Longshoremen's Act applies to injuries upon navigable waters, even though State workmen's compensation might also be available.

The other decisions relied upon by petitioner either sustained the Longshoremen's Act coverage or federal admiralty jurisdiction,[8] or concerned accidents where the injury was sustained wholly upon the wharf.[9] There is no conflict between the decision of the court below and the decisions of other federal appellate courts. Indeed, recent decisions of other courts of appeals have repeatedly sustained the deputy commissioners' awards of Longshoremen's Act compensation against contentions that the injury did not occur upon navigable waters within the meaning of the Act. *Boston Metals Co.* v. *O'Hearne*, 329 F. 2d 504 (C.A. 4), certiorari denied, 379 U.S. 824; *Holland* v. *Harrison Bros. Dry Dock & Repair Yard*, 306 F. 2d 369 (C.A. 5); *Michigan Mutual Liability Co.* v. *Arrien* (C.A. 2, No. 29241, April 5, 1965).

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[8] *L'Hote* v. *Crowell*, 54 F. 2d 212 (C.A. 5), reversed on other grounds, 286 U.S. 528; *Lowe* v. *Central R. Co. of New Jersey*, 113 F. 2d 413, 415 (C.A. 3) (where the court ruled that a shipkeeper's drowning was an injury occurring upon navigable waters, but that it did not arise out of his employment); *Thibodeaux* v. *J. Ray McDermott & Co.*, 276 F. 2d 42 (C.A. 5) (holding that the courts should not intervene until the Deputy Commissioner had an opportunity to rule on the question of whether the injury occurred upon navigable waters); *Minnie* v. *Port Huron Terminal Co.*, 295 U.S. 647 (sustaining maritime tort jurisdiction); *The Admiral Peoples*, 295 U.S. 649 (also sustaining maritime tort jurisdiction; *Vancouver S.S. Co.* v. *Rice*, 288 U.S. 445 (sustaining admiralty tort jurisdiction for injury occurring aboard ship upon navigable waters, although the resulting death occurred upon land).

[9] *Swanson* v. *Marra Brothers*, 328 U.S. 1; *American Export Lines, Inc.* v. *Revel*, 266 F. 2d 82, 84 (C.A. 4).

Even if there were a reasonable basis for doubt as to whether the injury here occurred upon navigable waters within the meaning and coverage of the Act, the statutory presumption of coverage (Section 20(a), 33 U.S.C. 920(a), *supra*, p. 3) is sufficient to sustain the claimant's election to seek Longshoremen's Act benefits. For it can hardly be denied that the claimant and the deputy commissioner were reasonable in believing that the injury in this case, which was consummated upon the navigable waters, was an injury occurring upon the navigable waters within the meaning and coverage of the Longshoremen's Act. No more need be shown to sustain the claimant's election and the award by the Deputy Commissioner. *Davis* v. *Department of Labor*, 317 U.S. 249, 256-257.[10] Indeed, to overturn the award here might be to leave the claimant without a compensation remedy,[11] the very result which the Longshoremen's Act was designed to prevent. *Davis* v. *Dept. of Labor, supra*, 317 U.S. at 254; *Calbeck* v. *Travelers Insurance Co.*, 370 U.S. 114, 116-117.

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[10] Accord: *Holland* v. *Harrison Bros. Dry Dock & Repair Yard*, 306 F. 2d 369 (C.A. 5); *Michigan Mutual Liability Co.* v. *Arrien* (C.A. 2, No. 29241, April 5, 1965). See also, *Hahn* v. *Ross Island Sand & Gravel Co.*, 358 U.S. 272, 273; *Avondale Marine Ways* v. *Henderson*, 346 U.S. 366.

[11] For it appears, as we have noted above, that the claimant here would be barred by limitations from seeking recovery under the State compensation act. See, *supra*, pp. 5-6, fns. 1 and 3.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

JOHN W. DOUGLAS,
Assistant Attorney General.

MORTON HOLLANDER,
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Attorneys.

MAY 1965.

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FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENT, MARCELLA R. NIELSEN, IN OPPOSITION.

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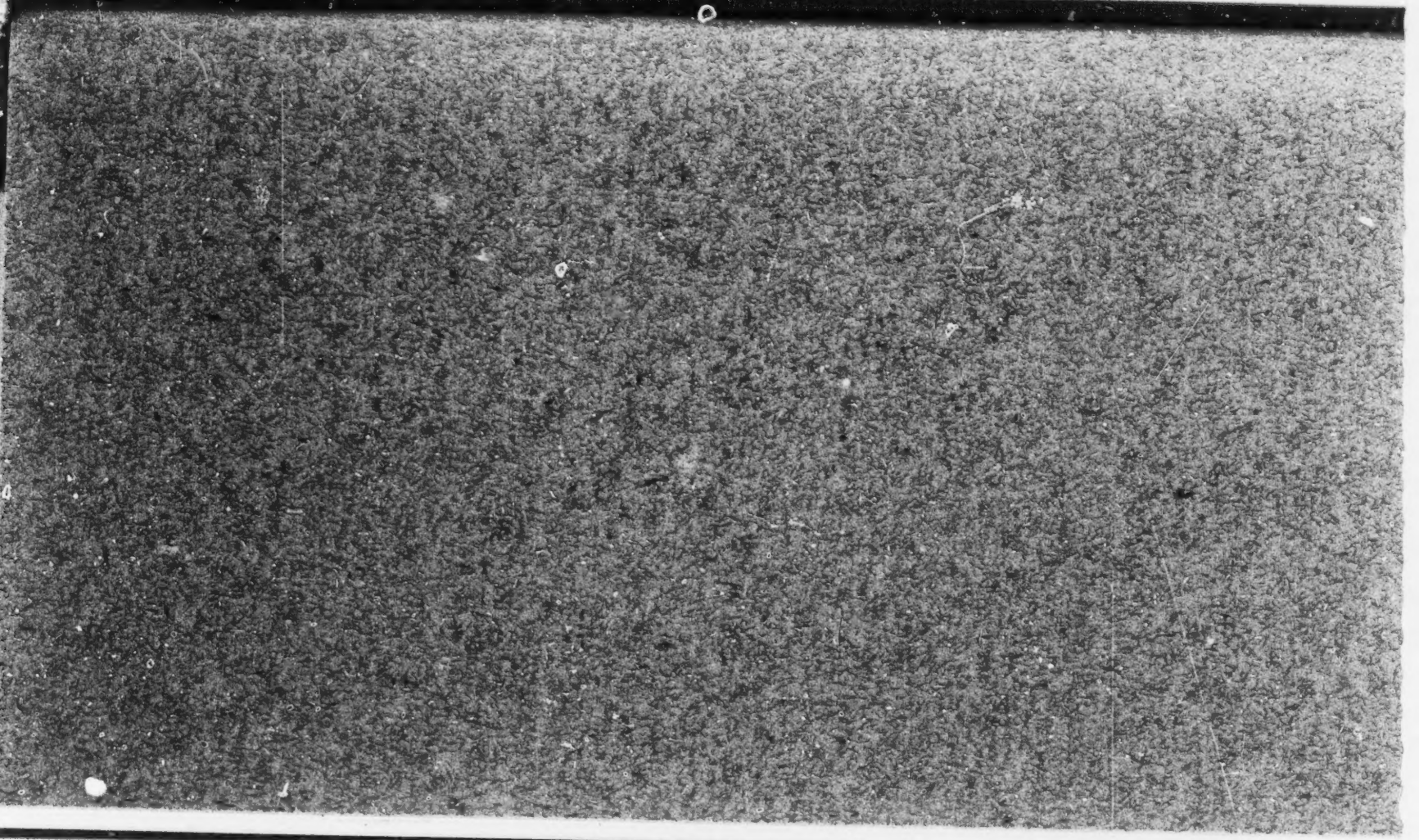

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The opinion of the District Court (Pet. App. 8-16) and the findings and the award of the Deputy Commissioner (Pet. App. 2-7) are unreported.

This brief of respondent, Marcella R. Nielsen, in opposition to the petition for writ of certiorari, is filed within the time enlarged by the Clerk under Paragraph 5 of Rule 34.

JURISDICTION.

The judgments of the Court of Appeals were entered on December 3, 1964. (Pet. App. 24-25.) A timely petition for rehearing was denied on January 12, 1965. (Pet. App. 25.)

The petition for writ of certiorari was filed on March 25, 1965.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

STATEMENT OF QUESTION PRESENTED FOR REVIEW.

An award of death benefits was made by the Deputy Commissioner under the Longshoremen's Act, co-respondent herein, to the widow and the two minor children of Carl O. Nielsen, a maritime worker, who was fatally injured in the course of his employment on January 11, 1959, from the impact of the top of his automobile, which he was using in the performance of his maritime duties, upon the frozen waters of Maumee Bay, where his vessel, the S. S. Arcturus, was berthed for the winter.

The deceased suffered no injury whatsoever, while the car was on the dock and the fatal injury *first* occurred, *after* the vessel left the dock and struck, upside down, on the frozen waters below the dock.

The single, narrow question of law here sought to be reviewed on petition for a writ for certiorari is whether, on the undisputed facts thus found by the Deputy Commissioner from evidence in a voluminous record before him, and, accepted by both lower courts, the fatal injury suffered *in fact* from the impact of the car on the ice below the dock, was an "injury occurring upon the navigable waters of the United States," within the legal meaning of those words, as found in the Longshoremen's Act.

STATEMENT OF THE CASE.

The decisive facts found by the Deputy Commissioner are not in controversy. They were accepted as true by both lower courts.

The S. S. Arcturus was berthed for the winter of 1959 at a dock on Maumee Bay on Lake Erie.

Nielsen was regularly employed as a shipkeeper by petitioner, The Interlake Steamship Company, of certain vessels owned by it, during the closed season of navigation on the Great Lakes. It happened that he had also been regularly employed by the same vessel owner, as licensed engineer on its vessels, during the open season of navigation on the Great Lakes. In a word, he was a maritime worker in the fullest sense of that term.

In the performance of his duties as shipkeeper of the S. S. Arcturus on January 11, 1959, Nielsen was using the lights of his automobile, apparently for the purpose of inspecting his ship's mooring lines, where they extended beyond the mooring dock, as found by the Deputy Commissioner. (Pet. App. 4, 5.)

For some unexplained reason, not established by any evidence, it happened that—the automobile went over and off the end of the dock, alongside the ship, and struck upside down on the ice and waters below the dock.

From that impact, of the top of the automobile on the ice, the Deputy Commissioner found as a fact, that Nielsen sustained injury, in the form of skull fractures and brain damage, which caused his death. (Pet. App. 5.)

There was no evidence in the record before the Deputy Commissioner and no factual finding by him that Nielsen had suffered any injury whatsoever from any accident on the dock. (Pet. App. 2, 3, 4, 5 and 6.)

The Deputy Commissioner therefore, on the basis of his factual finding as to the situs of the fatal injury, and

on the basis of his further finding that the fatal injury occurred while Nielsen was in the performance of his duties as shipkeeper, made an award of death benefits to Nielsen's surviving widow and two minor children. (Pet. App. 7.)

The award thus made by the Deputy Commissioner was reviewed by the District Court under the limited scope of review provided for in the Longshoremen's Act.

For the reason set forth in the opinion of the District Court, the award to the surviving dependents of Nielsen was nullified.

The District Court wrote the rationale for this result as follows:

> "The Deputy Commissioner found that Carl Nielsen's death resulted from an injury occurring upon the navigable waters of the United States * * * (Pet. App. p. 11.)
>
> "In a compensation case where we are not concerned with a breach of duty, I think the test must be that if the impetus which put in motion the sequence of events resulting in the fatal accident came from land, and operated on the person injured while on land, then there can be no jurisdiction and no valid award. (Pet. App. p. 14.)
>
> "Being mindful of the broad purposes of the Act, and the liberal construction to be given its provisions, together with the weight residing in the Deputy Commissioner's findings of fact, it is my considered judgment that assuming facts as found by the Commissioner to be true, they do not support the legal conclusion that Carl Nielsen's fatal injury occurred upon navigable waters of the United States. Carl Nielsen drove off the dock and crushed his skull on the ice below. Whatever the reason that caused him to drive off the dock* the occurrence or the condition that initiated and brought about the fatal accident oc-

curred on the dock. Since this was not an injury occurring upon navigable waters, the Commissioner was without jurisdiction to make the award." (Pet. App. p. 15.)

Thus we have the theory relied upon by the District Court, for what we assuredly say was a "harsh and incongruous result," to use the words of this Court.

The statutory presumption of coverage, which Congress wrote into the Act itself, was ignored.

The broad powers given to the Deputy Commissioner under the Act were fluffed off with a casual reference thereto in the opinion.

The liberal construction to be given to the Act and the repeated mandates of this Court, that the objectives of this humanitarian legislation were to be of prime consideration —all were ignored, in favor of abstractions about "impetus," "sequence of events," "starting on the dock," etc., in a record wholly devoid of any evidence of "blows," or "trauma," or "injury," or "accident" on the dock.

The limited scope of review permitted the District Court was completely disregarded. 33 U. S. C. § 922(b).

This Court by clear mandate, has more than once directed that awards of compensation must be upheld if the Deputy Commissioner's choice of inferences has substantial roots in the evidence and is not forbidden by law.

O'Leary vs. Brown-Pacific-Maxon, 340 U. S. 504 (1951);

Voris vs. Eikel, 346 U. S. 328, 333 (1953);

Cardillo vs. Liberty Mut. Ins. Co., 330 U. S. 469, 477-479 (1947).

This, too, was disregarded by the District Court.

On appeal to the Circuit Court of Appeals for the Sixth Circuit, the nullification made by the District Court was reversed and an order made to reinstate the award of death benefits to the surviving dependents of Carl Nielsen, deceased. (Pet. App. 24.)

Chief Judge Weick and Senior Circuit Judge E. Barrett Prettyman of the District of Columbia heard the case. A clear, perceptive and convincing opinion was written by Circuit Judge Edwards for a unanimous court, in complete refutation of the fallacies relied upon by the District Court. (Pet. App. p. 17-25.)

One other tangential subject requires some discussion under this heading of our statement of the case.

We find it necessary, by reason of the statements made at page 3 of the petitioner's petition, wherein the alleged availability of compensation to Nielsen's surviving dependents under the Ohio Workmen's Compensation Act is suggested, to answer the same.

Petitioner must know, as the employer of Carl Nielsen, that at no time was a claim for state compensation filed by his widow and at no time was any state compensation paid to her.

What is even more important, petitioner as the employer must also know, that the widow's failure to file any claim for state compensation within two years of the decedent's death viz on or before January 11, 1961, caused the claim to be time barred, as to any rights she may have had thereto, under Section 4123.84 of the Revised Code of Ohio.

We are willing to believe that this was an inadvertence on the part of petitioner, but we cannot let this Court have the possible impression that any state compensation is still available to the widow and her children.

The irony of the foregoing however is, that The Interlake Steamship Company, as employer, *did* set up the one year statute of limitation, as a defense against this respondent's claim, in this proceedings under the Longshoremen's Act. (Pet. App. 5, 6.)

It happened however that the vessel owner employer here—wittingly or unwittingly—did not file the statutory ten day notice of the fatal accident to Nielsen, which it was bound to do under penalty under the Longshoremen's Act. This failure—fortunately for the widow—had the effect of tolling the one year statute and preserving her rights under the Longshoremen's Act, since the Deputy Commissioner found that the employer had knowledge of the fatal injury and had not been prejudiced for want of notice. (Pet. App. 6; 33 U. S. C. 930(a)(e).)

It is of no moment here that these defaults by the widow were the result of her ignorance as to where, how and when to make claim for compensation and to the inexperience of the first legal adviser upon whom she relied for advice.

What *is* of moment however is, that the maze of legalisms which surround the right to workmen's compensation, where there are overlapping jurisdictions will continue to plague judges, lawyers, and claimants alike, if the particular claim happens to fall within the twilight area.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI.

I.

The Decision of the Circuit Court of Appeals Presents a Statement of Sound Law That Is Applicable to the Unique and Undisputed Facts Here Present and No Special or Important Reasons Exist for Review on Certiorari.

The uniqueness of the factual situation, as to the place and cause of Nielsen's fatal injury, and the undisputed character thereof have already been fully stated to the Court.

It is important however to remember that the multitude of the *dock side* injury cases, to be found in the reported decisions, and the multifarious ones where there was injury on the dock *and* in the water, have no relevancy here.

It is basic in the question presented to the Court that there was no accident involving any injury to Nielsen on the dock and that the *first* injury suffered by him occurred when the top of his car crushed his head from its impact on ice in the waters below the dock. In a word, the fatal injury here occurred within the literal language of the Longshoremen's Act as to situs.

This is hardly therefore the kind of case on its facts, which would require that the energies of the Court should be engaged in its resolution, on a writ for certiorari.

The irrelevant abstractions, relied upon by the District Court, as the ground for nullifying the award of the Deputy Commissioner, have been quite adequately dealt with in the opinion of the Court of Appeals.

Admiralty jurisdiction has historically depended on the place of the consummation of a maritime tort.

If on water, maritime jurisdiction existed, even though the breach of duty causing injury or damage originated on land.

Smith vs. Lampe, 64 F. 2d 201 (1933), cert. denied 289 U. S. 751;

Weinstein vs. Eastern Air Lines, 316 F. 2d 758 (3 CCA 1962—cert. denied 375 U. S. 940).

If on land, jurisdiction did not exist, i.e. *prior* to 1948, when Congress enacted the Admiralty Extension Act. 46 U. S. C. 740.

Since 1948, admiralty jurisdiction does exist, if the force or breach of duty causing the injury, started on navigable water and was consummated on land.

This simple statement of the basic principles of maritime jurisdiction, as it now exists, seems to us clear and settled beyond debate.

We are not so sure as to the attitude of petitioner thereon, in the light of its stubborn insistence on the application of old decisions which ceased to have any relevancy or vitality, after the passage of the Extension Act.

We will not unduly extend this brief therefore with a case by case analysis of the decisions cited in the petition for certiorari.

We did so in our brief before the Court of Appeals and that Court has stated the reasons why they have no application to the facts in this case.

Our answer thereto here can be limited to the enlightened statement thereon of Judge Brown in the case of *Pure Oil Company vs. Snipes*, 293 F. 2d 60 (5 CCA—1961).

The question at issue was, whether the maritime law or the law of Louisiana determined jurisdiction, with respect to the personal injury claim of a worker known as a

roughneck, who fell from a drilling platform, affixed to the ocean floor in the Gulf of Mexico, into the sea, first however striking the deck of the platform and then two girders in the course of his fall.

Judge Brown wrote as follows:

"At most, we have a question whether Congress may treat an occurrence in this new geographical area as substantially maritime even though on traditional lines an event taking place on a structure fixed permanently to the bed of the water might be regarded as non-maritime. For that matter, even in the development of that decisional law, the course was never fixed and there were frequent conceptual deviations. Thus, while damage by vessels to a pier was non-maritime, Plymouth (1866), 70 U. S. 20, damage to a beacon or similar structure maintained primarily as an aid to navigation, was maritime. Blackheath (1904), 195 U. S. 361; Raithmoor (1916), 241 U. S. 166. After considerable difference of opinion in the lower courts, the Supreme Court finally held in Admiral Peoples (1935), 295 U. S. 649, 1935 A. M. C. 875, that injuries received on the dock as a result of falling from a defective ship's gangway were maritime: In T. Smith & Son, Inc. vs. Taylor (1928), 276 U. S. 179, 1928 A. M. C. 447, a longshoreman standing on the wharf projecting a few feet over the water was struck by a sling load of cargo and was knocked into the water where he was some time later found dead. The Court held that occurrence was subject to the local law, not maritime. In contrast, in L'Hota vs. Crowell (5 Cir., 1931), 1932 A. M. C. 27, 54 F. (2d) 212, we held that a longshoreman working ashore who violently hit the side of the vessel while riding the ship's tackle and thereupon fell to the wharf sustained maritime injuries. In Minnie vs. Port Huron Terminal Co. (1935), 295 U. S. 647, 1935 A. M. C. 879, the longshoreman on the deck of the vessel was struck by a swinging hoist precipitating

him to the wharf. These injuries were held to be maritime. *Many of these refined distinctions are now of historic and academic interest only since Congress cut through many of them by the 1948 Act which extends admiralty and maritime jurisdiction to 'all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.'* 46 U. S. Code, sec. 740. *Its constitutionality has been upheld. United States vs. Matson Nav. Co.* (9 Cir., 1953) 1953 A. M. C. 272, 201 F. (2d) 610." (Emphasis added.)

See also *Benedict* on *The Law of Admiralty,* Volume 1, Section 128, 1964 Pocket Supplement.

II.

The Reasons Urged by Petitioner For Granting Certiorari Are Misconceived and Without Merit.

1.

Admiralty Jurisdiction.

Starting at page 9 of the petition, petitioner argues that the decision of the Court of Appeals brings uncertainty to the one area of admiralty law that has always had a clear and certain meaning.

This must, we believe, be a tongue in cheek assertion and not too seriously made.

We say in reply that, on the contrary, it was the decision of the District Court here which brought doubt and uncertainty into an area of maritime law that was, prior thereto, clear and certain beyond the shadow of a doubt.

The efforts of this Court, to achieve harmony and uniformity in the overlapping areas of state and federal compensation cases, were made manifest in the twilight zone doctrine of the *Davis* case. 317 U. S. 249 (1942).

The most recent effort of this Court to accomplish the same results, was the decision in the *Calbeck* case, to the effect that the availability of state compensation was no longer a defense against a valid claim under the Longshoremen's Act. 370 U. S. 114 (1962).

The new and novel legal fiction found in the decision of the District Court here will, we respectfully suggest, call for no action by this Court, in the light of the decision thereon, of the Court of Appeals for the Sixth Circuit, by which it was reversed and the reasons given by that Court for its reversal.

2.

Cases Relied Upon By Petitioner.

We have already discussed the decisions, cited by petitioner on pages 11, 12 and 13 of the petition, and have attempted to show that they furnish no grounds for reviewing the decision of the Court of Appeals on the particular facts of this case.

3.

Petitioner's Criticism of the Court of Appeals' Decision.

Petitioner asserts at page 14 of the petition that the three reasons assigned by the Court of Appeals for its decision reveal misapprehension.

The first criticism is directed to what the Court of Appeals said about the expanding boundaries of maritime law.

We are told by petitioner that the lower Court mistook the particular text which it found in *Gilmore and Black's* treatise on *The Law of Admiralty* (1957).

Petitioner apparently overlooked the statement in this treatise which we brought to the attention of the Court of Appeals in our brief in that Court.

Professors Gilmore and Black concluded their chapter on "The Interrelationship of the Longshoremen's Act and State Compensation Statutes" with the following very illuminating summation, found at page 353:

> "It is to be hoped that when the Supreme Court gets around to clarifying the theory of the twilight zone, it will firmly discourage such subtleties and complexities. The purpose behind the invention of the twilight zone was apparently *to provide injured maritime workers with an easy and above all a certain remedy, at whatever cost of 'theoretic illogic.'* If the courts yield to the temptation, usually irresistible to any lawyer, of trying to make a kind of formal sense of the twilight zone, the result will be worse than 'maritime but local.' *The only thing to do, as the Massachusetts court suggested in Moores, is 'not to attempt to reason the matter through' but merely to apply the theory in whatever way may be necessary to see that the injured claimant does not lose his remedy in a maze of legalisms.*" (Emphasis ours.)

This was written in 1957 and therefore before the *Calbeck* decision of this Court *supra*. *Calbeck* has made true the prediction here made.

What is of prime importance in respect of the Nielsen claim is the final statement of the Gilmore and Black treatise which we have emphasized above, namely, that the prime duty of the courts, if justice is to be achieved, is to apply the theory in whatever way it must be done, and see to it that an injured claimant does not lose his remedy in a maze of legalisms.

The Deputy Commissioner and the Court of Appeals produced that very just result in this case for Nielsen's widow and children. The review sought herein on certiorari should, for this reason, as well as the others mentioned herein, fail.

Petitioner tells us that the Court of Appeals cited no decision in support of its statements as to the expanding boundaries of admiralty law.

In the brief filed by us in the Court of Appeals, we quoted at length from the recent decision of Circuit Judge Boreman, in the case of *Scott vs. Isbrandsten,* 327 Fed. 2d 113, 123 (4 CCA—January 1964). While Judge Boreman's opinion was not mentioned in the Court of Appeals decision, we again quote therefrom in part as follows:

> "The radical reconstruction of maritime personal injury law since 1940 has made much of the older case law of little more than antiquarian interest.
>
> "The volume of personal injury litigation since 1945, and particularly since 1950, has been so great that exhaustive citation of recent lower court cases would be an almost impossible task. These cases were decided against a rapidly changing background and many of them were of merely transitory interest; since the Supreme Court has claimed the field of maritime personal injury litigation as its own, lower court decisions have suffered from rapid technological obsolescence. Thus exhaustive citation to them would be fruitless and unhelpful. * * *"

CONCLUSION.

Respondent Marcella R. Nielsen respectfully submits that the petition of The Interlake Steamship Company for a writ of certiorari be denied upon the grounds that the judgment of the Court of Appeals for the Sixth Circuit was right and that no special and important reasons have been presented for granting the writ.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1964.

No. 1017.

THE INTERLAKE STEAMSHIP COMPANY,
Petitioner,

v.

MARCELLA R. NIELSEN and STEPHEN O'HEARNE,
Deputy Commissioner,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

REPLY BRIEF OF PETITIONER
In Support of
Petition for Writ of Certiorari.

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Only by departing standards fashioned by unanimous decisions in this Court was it possible for the court below to hold this case covered by a statute that says it applies:

> "*only if* the disability or death results from an injury occurring upon the navigable waters," 33 U. S. C. 903 (a).

The Court of Appeals held this statute satisfied on the astonishing ground that nothing happened when the decedent:

> "drove his car off the end of the dock" (Appendix, p. 18),

for, as the Court of Appeals viewed it, the decedent, sailing through the air, was quite all right:

"until the impact on the frozen substance of the navigable waters at the end of the dock." (Appendix, p. 23.)

Although the accident originated on land, and had no maritime cause, the Court of Appeals still held it covered by the statutes.

This has not been the law.

And unless other circuits also decide to jettison the past it is not the standard that controls upon the waterways of the near or far coasts, or the Gulf. Only on the waterways of the Sixth Circuit is the new rule law.

The harm the decision below does—and the reason the case should have the attention of this Court—is that it plunges into uncertainty the provision confining the statute to injury occurring "upon the navigable waters" that for the nearly 40 years of the statute's life has had a clear, certain and easily applied meaning. More: it throws into doubt—by rejecting as outmoded—the cases by which this Court has marked the boundaries of admiralty jurisdiction.

The decision below thus reaches far beyond the Longshoremen's and Harbor Workers' Compensation Act here before the Court.

If the new rule the court below embraced reflects the modern-day view this Court should say so.

On the other hand, if it is not for courts below to predict overthrow of authority by this Court, the time to say so is now. Otherwise this Court's task of putting, or keeping, the law in tidy order will become well-nigh an impossible one.

These critical issues are not met, much less answered, by the Deputy Commissioner's pretense that the decision below "is in accord with the settled principles established by prior decisions of this Court" (page 7 of the Deputy

Commissioner's brief), when the rationale this Court has at least three times rejected has in this case been embraced by the court below. As the Court of Appeals put it: those cases are not in accord with the "trend * * * in the direction of expanding the boundaries of admiralty jurisdiction toward land." (Appendix, p. 23).

Nor are the critical issues this case presents answered, or met, by resort, by both the claimant (page 9 of the claimant's brief) and the Court of Appeals (Appendix, p. 23), to the Admiralty Extension Act, 46 U. S. C. 740, a statute that, if language has meaning, can have nothing to do with this case.

To use the Admiralty Extension Act as a prop for the decision below is to proclaim the dubious character of the decision and—worse—to shroud yet another important statute in a sea of murk.

The rule that is to govern this important area should not be left uncertain. Nor should law of the east and west coasts, and the Gulf, cease to be law on waterways ruled by the Sixth Circuit.

The petition for the writ of certiorari surely should be granted.

Respectfully submitted,

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TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

PETITION FOR REHEARING.

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TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

PETITION FOR REHEARING.

The Interlake Steamship Company petitions for rehearing of the Court's June 1, 1965, denial of certiorari because:

1. Since Nielsen was decided by the Sixth Circuit, question concerning the reach of admiralty jurisdiction has arisen in four circuits, the Second, Fourth and Fifth, and in a yet later case in the Sixth. Each has applied a different standard.

Nielsen arose under the Longshoremen's and Harbor Workers' Compensation Act. The statute applies "*only if* the disability or death results from an injury occurring upon the navigable waters of the United States * * *." 33 U. S. C. 903(a). As the statutory history and *Calbeck v. Travelers Insurance Co.* (1962), 370 U. S. 114, show,

the reach of the statute and the reach of admiralty jurisdiction coincide. But, an astonishing contrariety of rule, commencing with *Nielsen*, has come to pass, *viz*:

(a) IN THE SIXTH CIRCUIT there are now two standards:

> In this case, *Nielsen*, 338 F. 2d 879 (decided December 3, 1964), where the shipkeeper drove his automobile off the end of the dock, Judges Edwards, Weick, and Prettyman (reversing the decision of Judge Jones in the District Court) held the injury occurred "upon the navigable waters of the United States" because, the court reasoned, nothing happened until the automobile landed on the navigable waters of Maumee Bay. The point to note is that the Court of Appeals held, not the place of origin, but the *place of consummation* of the injury controlled.
>
> Eight weeks later, in *Wiper v. Great Lakes Engineering Works* (6 C. A., 1965), 340 F. 2d 727 (decided January 29, 1965), where a ship's engineer fell off the dock and drowned in navigable waters, Judges Brooks, Miller and Edwards applied a different standard in determining whether admiralty law governed. This time the Court of Appeals held that because the decedent fell *from the dock*, the case was governed by state law—the law of the shore and *not* the law of the sea. As will be observed. the court held controlling the place *where the accident originated*, and not the place where the injury was consummated.

In both cases the train of events started on the dock; in both decedent met death in navigable waters. In one

case (*Nielsen*) federal law was held to govern; in the other (*Wiper*) state law was held to govern. To be sure, *Nielsen* arose under the Longshoremen's Act, whereas in *Wiper* claim was asserted for "a maritime tort." 340 F. 2d at 729. The test of jurisdiction, however, cannot rationally differ from the one case to the other.

The only explanation the Court of Appeals gave for its different rule in *Wiper* was (340 F. 2d at 730):

> "There [in *Nielsen*] the coverage of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 903(a), was held to extend to a claim for injury or death when the situs of the injury or death was in navigable waters regardless of whether the cause had a land-based origin. In the present case it is the locality of the tort that governs the question of whether maritime or state law is applicable rather than the locality where the injuries or death occurred which, as held by *Interlake*, determines coverage under the Longshoremen's and Harbor Workers' Compensation Act. For these reasons then, there is no merit to plaintiff's claim that the tort here in question occurred in navigable waters."

This would appear to be a plain case of circular reasoning. It emphasizes the need for inspection here. For what is outside the reach of the admiralty law in the one case must also be in the other, if words are to have meaning.

(b) In the Second Circuit in *Michigan Mutual Liability Co. v. Arrien* (2 C. A., 1965), 344 F. 2d 640 (decided April 5, 1965, four months after *Nielsen*), the Court of Appeals (Judges Kaufman and Moore, with Judge Hays dissenting) gave the statute a different construction. The majority held the case covered by the Longshoremen's and Harbor Workers' Compensation Act, not because the workman fell into navigable waters, but because the

structure, temporarily affixed to the dock from which he fell, was "over" navigable waters and was, therefore, *not* to be regarded as part of the dock (which under admiralty law is deemed land). Judge Hays dissented. He considered the structure a part of the dock, and the case, therefore, not within the statute.

All three judges, it will be noted—differing from the Sixth Circuit's *Nielsen* decision—considered the place of origin, and not the place of consummation of injury, controlling.

(c) IN THE FOURTH CIRCUIT in *Hastings v. Mann* (4 C. A., 1965), 340 F. 2d 910 (decided January 11, 1965, five weeks after *Nielsen*), Judges Haynsworth, Boreman and Bell, upon a libel in admiralty, denied jurisdiction in admiralty even though the claimant was standing in navigable waters, on an underwater structure, when he slipped and fell. 340 F. 2d at 912. The structure from which the claimant fell was a launching ramp which led from shore to deep water. Since it was affixed to land, the court, in accord with the traditional view, deemed it part of the land, and the case, therefore, beyond the reach of admiralty.

It will be observed that in the Second Circuit a structure "over" navigable waters (but affixed to the dock, *i.e.*, land) is deemed to be "upon the navigable waters of the United States," whereas in the Fourth Circuit a structure even though "under" navigable waters (but affixed to land) is deemed to be part of the land.

(d) IN THE FIFTH CIRCUIT there is now pending on appeal (Docket No. 21,770) *Atlantic Stevedoring Company, Inc. v. O'Keeffe* (S. D. Ga., 1963), 220 F. Supp. 881, where District Judge Scarlett applied the traditional rule to the Longshoremen's and Harbor Workers' Compensa-

tion Act. Decedent fell from the dock and met death in navigable waters. The court held the case not covered by the Longshoremen's Act. Why? Because (220 F. Supp. at 885):

> "I find that the locality of the accident was on the dock and that the dock is not a part of the navigable waters of the United States * * *."

As will be observed, the court—differing from the Sixth Circuit's *Nielsen* decision—held the place of origin, and not the place of consummation of the injury, controlled.

Where like problems arise in so many circuits, and receive differing answers, the situation is one this Court should examine.

2. The foregoing considerations were not presented to the Court in the petition for a writ of certiorari. Three of the cases were decided after *Nielsen;* in the fourth the appeal is still pending, undecided. The conflicting standards adopted in those cases satisfy, as counsel believes, the requirements of Rule 58 Paragraph 2, concerning rehearing.

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June 22, 1965.

Certificate of Counsel.

As counsel for Petitioner, The Interlake Steamship Company, I certify that the foregoing Petition for Rehearing is presented in good faith, and not for delay, and is restricted to grounds which are, as I believe, intervening circumstances of substantial and controlling effect within the meaning of Rule 58, Paragraph 2, and constitute also substantial grounds not previously presented to the Court in the petition for certiorari.

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